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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

WALKER RIVER PAIUTE TRIBE,

Plaintiff-Intervenor,

V.

WALKER RIVER IRRIGATION DISTRICT,  
a corporation, et al.,

Defendants.

MINERAL COUNTY,

Proposed Plaintiff-Intervenor,

V.

WALKER RIVER IRRIGATION DISTRICT,  
et al.,

Proposed Defendants.

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E	Petition of Mineral County and Walker Lake Working Group for Writ of Mandamus and Writ of Prohibition In the Supreme Court for the State of Nevada, No. 36352 (June 26, 2000)

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1 The District addresses each of Mineral County's contentions in turn.<sup>1</sup>

2 **II. THE RETAINED JURISDICTION PROVISION OF THE WALKER RIVER**  
 3 **DECREE DOES NOT GIVE THIS COURT JURISDICTION TO ADJUDICATE**  
 4 **CLAIMS TO ADDITIONAL WATER RIGHTS.**

5 Mineral County seems to acknowledge that its Amended Complaint does not ask the  
 6 Court to recognize a water right to be held by it for the benefit of Walker Lake. Yet, it argues  
 7 that, if it is so characterized,<sup>2</sup> the Court has jurisdiction to hear it based upon Paragraph XIV of  
 8 the Walker River Decree. Dkt. 759 at 14, lns. 11-17. Mineral County does not dispute the fact  
 9 that there is no independent jurisdictional basis for the Court to hear such a claim because a  
 10 claim for a water right is based solely on state law. *See*, District Points and Authorities, Dkt.  
 11 751-1 at 5, lns. 7-25. Therefore, if there is no retained jurisdiction to hear a claim for a water  
 12 right, Mineral County's Amended Complaint must be dismissed, if a water right is what it seeks.  
*Id.*

13 In relevant part, Paragraph XIV of the Walker River Decree provides:

14 The Court retains jurisdiction of this cause for the purpose of changing the  
 15 duty of water or for correcting or modifying this decree; also for regulatory  
 16 purposes, including a change of the place of use of any water . . . .

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18 <sup>1</sup> Mineral County begins its response with information concerning the current status of  
 19 Walker Lake. Dkt. 759 at 4-6. That information is not relevant to the issues presently before the  
 20 Court, and the District does not respond to it directly. Suffice it to say, the natural flow of water  
 21 to Walker Lake has not been cut off during the 20th Century. Dkt. 759, lns. 12-13. That flow has  
 22 been less than it would have been if pioneers had not arrived in the valleys of the Walker River and  
 23 its tributaries beginning in the late 1850s and early 1860s, and if irrigation did not take place on the  
 24 Walker River Reservation. In addition, the flow to Walker Lake fluctuates depending upon  
 25 precipitation in the Walker River Basin. Those flows range from 575,870 acre feet in 1983 to no  
 26 surface flow at all in very dry years. The years 2012, 2013 and 2014 have been extremely dry, with  
 27 2014 being one of, if not the, driest year on record. This multi-year drought has taken its toll on the  
 28 entire Walker River Basin. However, other actions have been taken and are being taken with  
 respect to Walker Lake within the confines of the existing Walker River Decree and Nevada's  
 comprehensive water law which, as discussed *infra* at 12-13, ultimately bear on the relationship,  
 if any, between Nevada's comprehensive water law and the public trust doctrine.

<sup>2</sup> Mineral County accuses the District of "mischaracterizing" its claim. Dkt. 759 at 13, lns. 20,  
 14, ln. 3. The District has merely stated and addressed two possible constructions of Mineral  
 County's Amended Complaint. *See*, Dkt. 751-1 at 2-3.

1 Walker River Decree at para. XIV. Mineral County, like the United States and the Tribe, in  
2 essence argues that the retained jurisdiction for “modifying” the Decree means that the Court  
3 retains exclusive jurisdiction to determine all subsequent claims to water from the Walker River.  
4 Mineral County suggests that the District’s interpretation of Paragraph XIV renders the term  
5 “modifying” superfluous. Neither is the case.

6 Like the Tribe and the United States, Mineral County relies on principles of construction  
7 of decrees, including consent decrees, in its argument on this issue. Dkt. 759 at 14-15. Those  
8 principles include presuming the language used was the result of thoughtful and deliberate  
9 action, and that the meaning of a decree should be discerned from the decree itself. Dkt. 759 at  
10 15. The District does not dispute those principles. Their application here establishes that  
11 retaining jurisdiction to “modify” the Walker River Decree is not a retention of exclusive  
12 jurisdiction to determine additional water rights to the Walker River.

13 The time when Paragraph XIV was written, and its author’s understanding of the law at  
14 the time, both bear on its meaning. Paragraph XIV was written by the trial judge, Judge St. Sure,  
15 in 1936. Paragraph XIV was not modified when the Walker River Decree was amended in 1940.  
16 When he wrote Paragraph XIV, Judge St. Sure had ruled that all water rights in the Decree had to  
17 be acquired under state law, including those of the United States. *See, United States v. Walker*  
18 *River Irrig. Dist.*, 11 F.Supp. 158, 167 (D. Nev. 1935). In addition, he knew that since 1905 in  
19 Nevada and since 1914 in California, appropriative water rights could only be obtained under  
20 state law by an application for and a permit issued by the appropriate state agency. *See*, N.R.S.  
21 §§ 533.030(1); 533.325; Cal. Water Code §§ 1225, *et seq.* He knew that no court could simply  
22 determine and grant a water right established in either State after those dates.

23 Other provisions within the Decree also bear on the meaning of Paragraph XIV, and  
24 recognize the authority of the state agencies over water of the Walker River. Paragraph IX of the  
25 Decree tabulates numerous applications to the Nevada State Engineer for permits to appropriate  
26 water. The Decree states that all such applications and permits were subject to “final action by  
27  
28

1 the State Engineer upon such applications.” Walker River Decree at 66-70. It says the same  
2 thing with respect to pending California permits in paragraph VIII of the Decree. *Id.* at 65.

3 Judge St. Sure knew that in some cases, after compliance with the requirements of  
4 Nevada law, the amount of water actually appropriated as determined by the State Engineer  
5 might well be different than the amount applied for and initially permitted. For example, at page  
6 68 of the Decree, a water right is recognized for “Perry, Oliver A.” under Application No. 3369.  
7 The Decree shows that 2.4 CFS for 240 acres had been applied for. *Id.* The Application shows  
8 the same thing. *See*, Exhibit A. However, ultimately the State Engineer limited the water right,  
9 as the Decree allows, to .638 CFS for only 63.80 acres. *See*, Exhibit B.

10 The language used by Judge St. Sure in Paragraph XIV was thoughtful and deliberate.  
11 Other thoughtful and deliberate provisions of the Decree show that he did not intend to retain  
12 jurisdiction to determine claims to all Walker River water. He intended precisely the opposite.  
13 He recognized that subsequent appropriations, including those of the United States, would be  
14 determined by the respective Nevada and California agencies charged with that responsibility.

15 The District’s interpretation of the word “modifying” does not render it superfluous and  
16 unnecessary. The District does not contend that the word “modifying” should be read as  
17 synonymous with the word “correct.” The Court can and has modified the Decree in ways which  
18 were not corrections of it. “Modify” means to change something in the Decree, even if what is  
19 changed was originally correct.

20 The Court has in the past modified the Decree to reflect new points of diversion and new  
21 places of use. *See*, C-125, Dkt. 805. It has also modified the Decree to reflect new owners of  
22 water rights. *Id.* It effectively modified the provisions of the Decree concerning appointment of  
23 a Water Master when it issued orders appointing a United States Board of Water Commissioners.  
24 *Compare* Walker River Decree para. XV with Order Appointing U.S. Board of Water  
25 Commissioners entered May 12, 1937, attached hereto as Exhibit C, and Order Amending May  
26 12, 1937 Order entered January 28, 1938, attached hereto as Exhibit D. The Court also modified  
27 the Decree when it entered the Order for Entry of Amended Final Decree on April 24, 1940.



1 Mineral County also seeks modification of the Decree under the public trust doctrine. Dkt. 759  
 2 at 16, Ins. 4-9. The Court may also modify the Decree to reflect final water right determinations  
 3 by the Nevada State Engineer and California State Water Resources Control Board. None of  
 4 these modifications are “corrections.”

5 Paragraph XIV of the Walker River Decree is not a retention of jurisdiction to determine  
 6 additional claims to water. Therefore, if Mineral County’s Amended Complaint seeks a water  
 7 right for Walker Lake, the Court has no retained jurisdiction to hear it, and because it is a claim  
 8 based upon state law, there is no independent basis for subject matter jurisdiction. *See*, Dkt. 751-  
 9 1 at 5.

10 **III. THE COURT SHOULD STAY ITS EXERCISE OF JURISDICTION BECAUSE**  
 11 **NEVADA LAW ON THE RELATIONSHIP, IF ANY, BETWEEN NEVADA’S**  
 12 **COMPREHENSIVE WATER LAW AND THE PUBLIC TRUST DOCTRINE IS**  
**NEITHER CLEAR, NOR SETTLED.**

13 **A. Introduction.**

14 Mineral County does not dispute the fact that the relationship between Nevada’s  
 15 comprehensive water law and the public trust doctrine are issues of enormous import to all of  
 16 Nevada. It does not challenge the fact that these issues have the potential to impact surface water  
 17 rights, and more importantly, those who rely on those rights throughout the entire state. Mineral  
 18 County does suggest that the public trust doctrine as applied elsewhere does not affect ground  
 19 water and has no bearing on the ground water rights sought by the Southern Nevada Water  
 20 Authority in eastern Nevada. Dkt. 759 at 21, n.4. However, Mineral County relies on *In Re*  
 21 *Water Use Permit Applications*, 9 P.3d 409 (Haw. 2000). The court in that case ruled that the  
 22 doctrine applies “to all water sources without exception or distinction.” 9 P.3d at 445; 447.

23 Mineral County also contends that in *Mineral County v. Nevada*, 20 P.3d 800 (Nev.  
 24 2001) the District took a position opposite to that which it takes here, and that there the Nevada  
 25 Supreme Court held that this Court is the best forum to litigate this case. Mineral County argues  
 26 that *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959) and *Kaiser Steel*  
 27 *Corp. v. W.S. Ranch Co.*, 391 U.S. 593 (1968) do not apply here because “the Nevada Supreme  
 28

1 Court already has considered and ruled on the public trust doctrine, its contours and relationship  
2 with the rest of Nevada water law.” Dkt. 759 at 20; *see also*, Dkt. 759 at 16-17.

3 The District’s position here and in *Mineral County v. Nevada* are consistent. The Court  
4 in *Mineral County* did not hold that this is the forum to decide the relationship between the  
5 public trust doctrine and Nevada’s comprehensive water law. Importantly, that relationship has  
6 never been addressed by the Nevada Supreme Court.

7 **B. *Mineral County v. Nevada* Does Not Hold That This Court Is the Best Forum**  
8 **for Establishing the Relationship of the Public Trust Doctrine to Nevada’s**  
9 **Comprehensive Water Law.**

10 *Mineral County v. Nevada* did not hold that this Court was the best forum in which to  
11 decide the scope of the public trust doctrine and its relationship to Nevada water law. It  
12 recognized and left open the possibility that that issue might well be referred by this Court to the  
13 Nevada courts.

14 *Mineral County v. Nevada* was an original proceeding brought in the Nevada Supreme  
15 Court by Mineral County and the Walker Lake Working Group nearly six years after Mineral  
16 County had sought intervention here. The only Respondents named were the State of Nevada,  
17 the Nevada Department of Conservation and Natural Resources, the Director of that Department,  
18 and the State Engineer. A copy of the Petition is attached hereto as Exhibit E.

19 Mineral County asked the Court to issue a Writ of Prohibition preventing the named  
20 respondents from granting any additional rights to withdraw surface or ground water from the  
21 Walker River system. It asked the Court to issue a Writ of Mandamus “compelling respondents  
22 to reconsider the appropriation and allocation of the waters of the Walker River system to  
23 provide for an annual instream flow to Walker Lake reasonably calculated to ensure the  
24 sustainability of the Lake’s public trust uses, including fisheries, recreation and wildlife.” *Id.*  
25 The District and others were allowed to intervene in that proceeding. The District filed an  
26 answer and a memorandum of points and authorities in opposition to the Petition.

27 The District challenged the Petition on numerous grounds based upon Nevada statutory  
28 and case law. It challenged the request for a Writ of Mandamus because it failed to name

1 necessary and indispensable parties, the very parties this Court had ordered Mineral County to  
 2 identify and serve.<sup>3</sup> It also challenged the request for a Writ of Mandamus because Mineral  
 3 County asked the Nevada Supreme Court to direct the Nevada State Engineer to modify the  
 4 water rights recognized by the Walker River Decree, something which Mineral County was  
 5 already seeking here, and something which only this Court has the power to do. *See, United*  
 6 *States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007 (9th Cir. 1999).

7 It was the District's position in *Mineral County v. Nevada*, and it is the District's position  
 8 here, that if the provisions of the Walker River Decree are to be modified based upon application  
 9 of the public trust doctrine, only this Court has jurisdiction to make those modifications.  
 10 However, that is not the issue which the District asks be directed to the Nevada courts.

11 The principal and determinative issue which the District asks that this Court refer to the  
 12 Nevada courts is whether Nevada's comprehensive water law, which does not allow for the  
 13 modification of vested water rights, is in violation of the public trust doctrine. That does not fly  
 14 in the face of any position the District took before the Nevada Supreme Court. The District did  
 15 not argue that it was improper for a Nevada court to decide such a significant issue of Nevada  
 16 law having state wide import.

17 In *Mineral County*, the Nevada Supreme Court did not decide anything concerning the  
 18 public trust doctrine.<sup>4</sup> The majority opinion concluded that Mineral County had not met its  
 19 burden of demonstrating that extraordinary writ relief was warranted. It appropriately left for  
 20

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21 <sup>3</sup> Mineral County accuses the District of a "series of cynical stratagems" to "delay and obstruct  
 22 resolution of the merits of Mineral County's public trust claim." Dkt. 759 at 17. Included in  
 23 those allegations is an assertion of obstruction of Mineral County's service efforts. Early on,  
 24 Mineral County complained that the District had interfered with and frustrated its attempts to  
 25 obtain waivers of service. Dkt. 31 at 5. It sought substantial sanctions from the District. *Id.* at 2.  
 26 The Court denied Mineral County's request for sanctions. Dkt. 44 at 10-13. Although what the  
 District did and why are not relevant here, they are explained in detail at Dkt. 40, and are  
 supported by the Court's order denying Mineral County relief. Suffice it to say that the District  
 responded in good faith to inquiries, and its response was based upon Mineral County's  
 unilateral decision to not mail documents which the Court clearly required be served.

27 <sup>4</sup> The "concurring" opinion of Justice Rose in *Mineral County* was essentially a dissent. He  
 28 disagreed with the majority, who chose not to address the role of the public trust doctrine in  
 Nevada, an issue which was not necessary for disposition of the case.

1 another day all of the remaining issues. It expressly recognized, however, that, at an appropriate  
2 time, Nevada courts might be asked by this Court to address the scope of the public trust doctrine  
3 in Nevada, and it did not rule out that possibility. It expressly stated that the issue need not be  
4 addressed via the extraordinary remedy of a writ. 20 P.3d at 807, n. 35.

5 *Mineral County* does not hold that this Court is the only proper forum in which to litigate  
6 the scope and extent of the public trust doctrine and its relationship to Nevada's comprehensive  
7 water law. What it does recognize is that if Nevada law requires modification of the Walker  
8 River Decree by reason of the public trust doctrine, then this Court is the proper forum in which  
9 that action would take place, not only because it is this Court's Decree which recognizes the  
10 water rights at issue, but also because this Court also administers water rights in California based  
11 upon California law, and on an Indian reservation based upon federal law.

12 **C. The Relationship Between Nevada's Comprehensive Water Law and the**  
13 **Public Trust Doctrine Has Not Been Considered and Ruled Upon by the**  
14 **Nevada Supreme Court.**

15 The fact that the Nevada Supreme Court announced in *Lawrence v. Clark County*, 254  
16 P.3d 606 (Nev. 2011) that it was adopting the public trust doctrine, does not mean that under  
17 Nevada law vested water rights must be modified to "ensure adequate inflows from the Walker  
18 River system to Walker Lake in order to restore and sustain the public trust values and uses of  
19 Walker Lake" as Mineral County seems to contend. *See*, Dkt. 759 at 16; 24. Indeed, the cases  
20 on which Mineral County relies do not so hold.

21 Mineral County relies on *National Audubon Society v. Superior Court of Alpine County*,  
22 658 P.2d 709 (Cal. (1983), and *In Re Water Use Permit Applications*, 9 P.3d 409 (Haw. 2000)  
23 for its restoration conclusion. However, both of those cases recognize that the public trust  
24 doctrine does not mandate that there be no harm to public trust values. In *Audubon*, the  
25 California Supreme Court said at the very outset of its opinion that commerce, development and,  
26 in some cases, life itself, cannot exist in the arid west without massive diversions of water out of  
27 streams and lakes for purposes unrelated to "navigation, commerce, fishing, recreation or  
28

1 ecological use relating to the source stream.” 658 P.2d at 712. It recognized that the state must  
 2 have the power to grant rights to appropriate water, even if diversions harm public trust uses. *Id.*

3 *Audubon* did not hold that the “public trust doctrine required the State of California to  
 4 ensure adequate inflows to Mono Lake,” as Mineral County contends. *See*, Dkt. 759 at 10, Ins.  
 5 11-13. The California Supreme Court said it did “not dictate any particular allocation of water.”<sup>5</sup>  
 6 658 P.2d at 732.

7 In *In Re Water Use Permit Applications*, the Supreme Court of Hawaii recognized that  
 8 competing public and private water uses are to be weighed upon a case by case basis. It stated  
 9 that the trust does not establish resource protection as a categorical imperative and the  
 10 precondition to all subsequent considerations.<sup>6</sup> 9 P.3d at 454. The other case on which Mineral  
 11 County relies, *Kootenai Environmental Alliance v. Panhandle Yacht Club*, 671 P.2d 1085 (Ida.  
 12 1983) did not involve water at all. It involved use of lands underlying navigable waters.

13 The Nevada Supreme Court’s decision in *Lawrence v. Clark County*, 254 P.3d 606 (Nev.  
 14 2011) does not even discuss, much less comprehensively outline, the contours of a public trust  
 15 doctrine and its relationship to Nevada’s water law. All of the Nevada cases referenced in  
 16 *Lawrence*, and *Lawrence* itself, involved issues related to title to land underlying navigable  
 17 waters. *See, State v. Cowles Bros., Inc.*, 478 P.2d 159 (Nev. 1970); *State v. Bunkowski*, 503 P.2d  
 18 123 (Nev. 1972).

19 In *Lawrence*, the issue was whether state owned land, which at one time was submerged  
 20 under the Colorado River, could be freely transferred to Clark County, or whether the public  
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23 <sup>5</sup> Ultimately, the California State Water Resources Control Board amended the water rights of the  
 24 Los Angeles Department of Water and Power. *See*, M. Blumm and T. Schwartz, *Mono Lake and*  
 25 *the Evolving Public Trust in Western Water*, 37 *Ariz. L. Rev.* 701, 719 (1995). It concluded that  
 26 the limitation would not produce water shortages for the sole water right holder involved because  
 it had replacement water from a variety of other sources. That is not the case here or anywhere  
 else in Nevada.

27 <sup>6</sup> It should be noted that, unlike the Nevada Constitution, the Hawaii Constitution mandates that  
 28 the state and its political subdivisions protect and conserve all natural resources in a manner  
 consistent with their conservation. *See*, 9 P.3 at 443-444.

1 trust doctrine prohibited the transfer. *Lawrence*, 254 P.3d at 607. A Nevada statute authorized  
2 the transfer. *Id.* at 608.

3 In order to determine the validity of the transfer of that land under the public trust  
4 doctrine, the *Lawrence* court adopted a three prong test. It ruled that when reviewing legislative  
5 dispensations of public trust property, Nevada courts will consider: “(1) whether the  
6 dispensation was made for public purpose, (2) whether the state received fair consideration in  
7 exchange for the dispensation, and (3) whether the dispensation satisfies the state’s special  
8 obligation to maintain the trust for the use and enjoyment of present and future generations.”  
9 254 P.3d at 616. It also ruled that when the legislature has found that a given dispensation is in  
10 the public’s interest, the legislative determination will be afforded deference. *Id.* at 617. If a  
11 Nevada court determines it is appropriate to apply the three prong *Lawrence* test in a use of  
12 water context, it will apply it against the dispensation of the right to use water by the Nevada  
13 legislature in Nevada’s comprehensive water law.

14 It is apparent from reading Nevada’s 1913 Water Law and Nevada Supreme Court cases  
15 decided nearly contemporaneous with its enactment, that the Nevada Legislature had several  
16 purposes in mind in enacting it. First, the Legislature intended to bring the use and distribution  
17 of water into the control of the state. Second, in doing so, it intended to encourage the use of  
18 such water for the economic benefit of the state. Third, it desired to bring order to a process  
19 which was uncertain and indefinite and which frequently involved long and expensive litigation.  
20 Fourth, when considering new appropriations and changes to existing and future rights, it desired  
21 that the State Engineer consider the public interest. Finally, in order to meet these purposes, it  
22 recognized that once a right to use water was perfected, it needed to be protected so that it could  
23 be relied upon.

24 Nevada Supreme Court decisions confirm those facts. *Ormsby County v. Kearney*, 37  
25 Nev. 314, 142 P. 803 (1914), involved the issue of whether, under the new law, the State  
26 Engineer could proceed to determine the relative priorities of water users on Clear Creek in  
27 Ormsby County and on the Humboldt River. 37 Nev. at 317. Justice Norcross described it as  
28

1 being “manifestly designed to be a comprehensive statute covering the water law of this state.”  
2 142 P. at 805. *See also, Vineyard Land and Stock Company v. District Court*, 42 Nev. 1, 13-14,  
3 171 P. 166 (1918) (the 1913 act provided “a method whereby unappropriated water might be  
4 appropriated, and whereby the relative rights of existing appropriators . . . might be determined  
5 without great delay and expense to the appropriators, and enabled the state to supervise and  
6 administer the distribution of such waters so that the greatest good might be attained therefrom  
7 for the development of our agricultural resources”).

8 In justifying its decision in *Audubon*, the California Supreme Court relied to a large  
9 extent on the fact that the grant of rights to use water in California did not require consideration  
10 of the “public trust” through a public interest analysis until 1955. *See, Audubon*, 658 P.2d at  
11 726. That has not been the case in Nevada since 1905 and is clearly not the case under Nevada’s  
12 1913 Water Law, or presently. *See*, N.R.S. § 533.370(2).

13 In 1913, when the Legislature required that new appropriations and changes to new and  
14 existing appropriations be measured against the public interest, it was aware that in all parts of  
15 Nevada there were existing rights to use water established under prior law. It might have chosen  
16 to subject those existing rights to that test. It did not do so. Instead, it stated that such rights  
17 would not be “impaired or affected by the provisions” of that act. N.R.S. § 533.085(1). In  
18 effect, the Legislature declared in no uncertain terms that those existing rights to use water were  
19 in fact in the “public interest” and should not be impaired. It also might have chosen to subject  
20 existing and subsequently established rights to use water to periodic review under the public  
21 interest test. Again, it did not do so. Instead, it provided a process for voluntary changes to  
22 those rights to meet evolving needs and values and subjected those voluntary changes to the  
23 public interest test when a change is requested. N.R.S. §§ 533.325; 533.370(2).

24 Application of the three prong *Lawrence* test does not involve an inquiry into whether  
25 this Court considered public trust values when it entered the Walker River Decree. That was not  
26 its role or its obligation. This Court merely quieted title to water rights in Nevada in accordance  
27 with Nevada’s water law. Water rights initiated before 1905 were recognized based upon  
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1 beneficial use and without any impairment by reason of Nevada's water law enacted on that date.  
2 Water rights initiated after 1905 had to be and were perfected in accordance with the laws in  
3 force at the time of their filing. *See*, N.R.S. § 533.085 (Section 84, 1913 Stats. of Nev.). Those  
4 water rights were finally determined by the Nevada State Engineer, who was required to consider  
5 whether their use "threatens to prove detrimental to the public interest." *See*, N.R.S. 533.370(2)  
6 (Section 63, 1913 Stats. of Nev.).

7       Thus, when this Court entered the Walker River Decree, it was merely confirming the  
8 dispensation of the right to use water as made by the Nevada legislature. What the *Lawrence*  
9 court did not consider, and if the public trust doctrine applies to the use of water, what the  
10 Nevada courts should consider, is whether that legislative dispensation satisfies the three prong  
11 *Lawrence* test.

12       The Nevada legislature has determined that the dispensation of the right to use water  
13 under Nevada's water law meets a public purpose, and that Nevada receives fair consideration  
14 for that use. It has determined that, through its provisions for changes to water rights, the water  
15 law is an effective tool for appropriate allocation of Nevada's water resources long after those  
16 water rights are first established. It allows water rights established in the 19th century for  
17 irrigation use to meet 21st century values, including values at Walker Lake.

18       Indeed, such changes are taking place while this litigation is pending. Through a series  
19 of public laws, the United States has appropriated funds to provide water for desert terminal  
20 lakes, including Walker Lake. The funding appropriated thus far is a total of \$525,000,000.00.  
21 *See*, Section 2507, Farm and Security Rural Investment Act of 2002, P.L. 107-171 ("Desert  
22 Terminal Lakes I"); Section 207 of P.L. 108-7 ("Desert Terminal Lakes II"); Section 208 of the  
23 Energy and Water Development Appropriations Act of 2006, P.L. 109-103 ("Desert Terminal  
24 Lakes III"); Section 2807 of P.L. 110-246 ("Desert Terminal Lakes IV"); Sections 206 through 208  
25 of P.L. 111-851 ("Desert Terminal Lakes V"), (authorizing the Bureau of Reclamation to provide  
26 \$66,200,000 to National Fish and Wildlife Foundation ("NFWF") for various purposes related to  
27 Walker Lake); and Section 2507 of the Agricultural Act of 2014, P.L. 133-179. Substantial portions  
28



1 of those funds have been and will continue to be granted for purposes of acquisition and change of  
2 existing water rights to benefit Walker Lake.

3 To date, through the use of that funding, NFWF has acquired, for the benefit of Walker  
4 Lake, 51.0 CFS of water rights recognized by the Walker River Decree appurtenant to  
5 approximately 4,000 acres of land. In addition, NFWF and the District have entered into an  
6 agreement to implement a demonstration program involving the lease of stored water for the benefit  
7 of Walker Lake as authorized by Desert Terminal Lakes V.

8 In Ruling 6271, the Nevada State Engineer approved NFWF's Change Application 80700  
9 changing a portion of the acquired water rights to benefit Walker Lake. That approval is now  
10 before this Court pursuant to NFWF's Petition filed April 4, 2014. *See*, C-125, Dkt. 1221. In  
11 addition, NFWF recently filed with the Nevada State Engineer Change Application Nos. 83768  
12 through 83771 to make similar changes to some, but not all, of other acquired rights. Those  
13 changes are being noticed, and will be processed in accordance with this Court's Administrative  
14 Rules concerning such changes.

15 Finally, the California State Water Resources Control Board recently approved temporary  
16 changes to the District's stored water rights to allow for implementation of a lease demonstration  
17 program as provided in Desert Terminal Lakes V. That approval is now before this Court pursuant  
18 to filings by the California State Water Resources Control Board and the District. *See*, C-125, Dkts.  
19 1248; 1249.

20 With respect to application of the *Lawrence* test to Nevada's water law, the law in Nevada is  
21 no further developed than was the law of California when the federal court in *National Audubon*  
22 *Society v. Department of Water*, 869 F.2d 1196 (9th Cir. 1989) directed that the action pending in  
23 that federal district court be stayed, and required Audubon to file an action in state court to  
24 resolve the relationship between the public trust doctrine and the California water rights system,  
25 and whether exhaustion of administrative remedies was a prerequisite to suit under the public  
26 trust doctrine. When *National Audubon* was decided, the California courts had addressed the  
27

1 public trust doctrine in connection with the beds and banks of navigable waters. *See, National*  
 2 *Audubon*, 658 P.2d at 719-20.

3 Water is Nevada's most valuable and scarce natural resource. The issues of whether the  
 4 balance struck by the legislature in Nevada's water law must satisfy, and does in fact satisfy, the  
 5 *Lawrence* test under the public trust doctrine, should be decided by Nevada courts. It is not a  
 6 decided and settled issue from *Lawrence* or any other Nevada case. *Kaiser Steel*, 391 U.S. 595 is  
 7 directly applicable here. The issue is one of vital concern to Nevada. *Kaiser Steel*, 391 U.S. at  
 8 594. Here, as there, "sound judicial administration requires that the parties in this case be given  
 9 the benefit of the same rule of law which will apply to all other businesses and landowners  
 10 concerned with the use of this vital resource." *Id.* at 594. As there, this action should be stayed  
 11 with this Court retaining jurisdiction to ensure disposition after a state court determination of the  
 12 determinative state law issue.<sup>7</sup> *Id.*

13 **D. The Issue of Whether a Single County Is Authorized to Bring a Public Trust**  
 14 **Claim Should Be Decided by Nevada Courts.**

15 Mineral County argues that it is the proper party to assert a claim seeking to enforce the  
 16 public trust doctrine here. It contends that any member of the public may bring a public trust  
 17 claim. Dkt. 759 at 24-25. Mineral County is not a member of the public. It is a political  
 18 subdivision of the State of Nevada, with its power and authority limited by the Nevada  
 19 legislature. It has only those powers as are expressly granted to it, or as are necessarily  
 20 incidental to those express powers. *King v. Lothrop*, 36 P.2d 355, 357 (Nev. 1934).

21 In *Rettkowski v. Department of Ecology*, 858 P.2d 232 (Wash. 1993), the Washington  
 22 Supreme Court ruled that the duty imposed by the public trust doctrine devolves upon the state,  
 23 and not any particular agency thereof. It held that the Washington Department of Ecology had  
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25 <sup>7</sup> Mineral County argues that the most efficient way to obtain that disposition is pursuant to Nev.  
 26 R. App. P. 5(a). The District, as well as the Court, is well aware of the procedure. The issue  
 27 should be decided by the Nevada courts based upon a well developed factual record. It should  
 28 not be made by the Supreme Court in a factual vacuum. That record should be developed in a  
 trial court.

1 no authority in its enabling statute to assume the state's public trust duties in order to protect the  
2 public trust. 858 P.2d at 239.

3 There is nothing in Chapter 244 of the Nevada Revised Statutes which gives any county,  
4 including Mineral County, the power and authority to assume Nevada's public trust duties in  
5 order to protect the public trust. Other Nevada counties benefit from and have public trust  
6 resources within the Walker River Basin. A Nevada court should decide whether a single county  
7 has the power and authority under Nevada law to bring and control an action to protect public  
8 trust interests.

9 **E. A Nevada Court Should Determine Whether There Are Administrative**  
10 **Remedies Which Must Be Exhausted.**

11 Mineral County relies on *National Audubon* for its contention that this Court, not the  
12 Nevada State Engineer, must make the ultimate determination concerning how rights recognized  
13 by the Walker River Decree might have to be modified, if it is decided that the Nevada  
14 legislature's dispensation of the right to use water violates the public trust doctrine. For the most  
15 part, the District agrees with that conclusion.

16 However, as noted above (at 3-4), a number of the water rights included in the Walker  
17 River Decree are water rights which were approved by the Nevada State Engineer under  
18 Nevada's statutory water law, and are water rights which this Court expressly stated are subject  
19 to "final action by the State Engineer." Water River Decree at para. 9, pgs. 65-70. The Nevada  
20 Supreme Court might well conclude that in situations where a water right has been permitted by  
21 the Nevada State Engineer, the appropriate beginning point for modification of that water right  
22 should be with the Nevada State Engineer. That is not an issue which was decided by *Lawrence*  
23 or has been decided in any other Nevada case.

24 **IV. CONCLUSION.**

25 This Court should stay this proceeding, and direct Mineral County to seek resolution in  
26 the Nevada courts of the relationship between the public trust doctrine and Nevada's  
27 comprehensive water law, on whether a single county is authorized to bring a public trust claim,

1 and whether there are any administrative remedies which must be exhausted in connection with  
2 any such claim.

3 Dated: June 30, 2014.

4 WOODBURN AND WEDGE

5  
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**CERTIFICATE OF SERVICE**

I certify that I am an employee of Woodburn and Wedge and that on the 30th day of June, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following via their email addresses:

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